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TO: Honorable Mayor Sproul and KDH Board of Commissioners

FROM: Casey C. Varnell, Town Attorney

**RE: Town Attorney's Agenda/January 26, 2022 BOC Meeting**

Dear Mayor and Board:

Recently, Town Staff has brought to my attention an issue concerning Chapter 153, Zoning, §153.077(D)(7) of the Kill Devil Hills Town Code which requires your input and potential action.

The attached Corrective Resolution is my proposed solution in providing clarity to the above-referenced provision of our Town Code. I based this solution on the legislative history relevant to said provision. At a public hearing occurring on June 13, 2011, the then-serving Board of Commissioners for Kill Devil Hills voted unanimously to approve the following amendment to our Town Code:

**Chapter 153, Zoning, §153.077(D)(7)**

**“For each food service business, menu boards and preview boards for each drive-through may be permitted, provided that the sum of all menu boards and preview boards does not exceed 60 square feet in total display area and does not exceed 8 feet in height above street or driveway elevation.”**

This code amendment was properly codified by the Town and was implemented as the new governing language of the subject zoning provision.

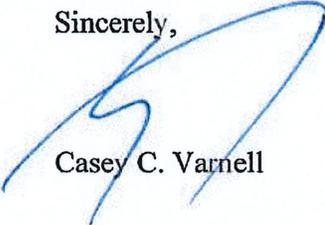
By clear mistake, and less than a year later, the then-serving Board of Commissioners addressed other amendments to Chapter 153, Zoning, §153.077. On May 23, 2012, a public hearing

was held which sought only to address the lighting associated with commercial signs in the Town. However, the proposed amendment inadvertently included the language within Chapter 153, Zoning, §153.077(D)(7) that existed prior to the 2011 adopted revision cited above. A review of the minutes associated with the 2012 public hearing reveal no mention or consideration of the language within Chapter 153, Zoning, §153.077(D)(7). Moreover, the public notices relative to the 2012 public hearing do not evidence any intent to change the language of Chapter 153, Zoning, §153.077(D)(7) as approved in 2011. Thus, substantive and procedural defects exist as to the 2012 amendment explicitly regarding Chapter 153, Zoning, §153.077(D)(7). These defects make any purported change to the 2011 language found within Chapter 153, Zoning, §153.077(D)(7) by the 2012 amendment null and void, as a matter of law.

Due to the foregoing, and in an effort to bring clarity to the Town Code of Kill Devil Hills, I find it appropriate for the Board of Commissioners to adopt the attached resolution. It is important to note that the adoption of this resolution does not require a public hearing, as there is no amendment being made to the Town Code through its adoption. The Town is simply re-codifying language to the zoning code which was duly adopted in 2011.

After discussion amongst the Board, a motion would be in order.

Sincerely,



Casey C. Varnell

Attachments



# TOWN OF KILL DEVIL HILLS

*Land Where Flight Began*

## **Corrective Resolution Relating to Kill Devil Hills Town Code of Ordinances, Chapter 153, Zoning §153.077(D)(7)**

The Board of Commissioners of the Town of Kill Devil Hills, North Carolina (hereinafter “Town”), hereby adopts the following Corrective Resolution:

### RECITALS

**WHEREAS**, on June 13, 2011, the then-serving Kill Devil Hills Board of Commissioners held vote at public hearing on amending Chapter 153, Zoning, §153.077(D)(7) of the Kill Devil Hills Town Code; and

**WHEREAS**, the amendment proposed to revise the aforesaid Town Code provision to read as follows: “For each food service business, menu boards and preview boards for each drive-through may be permitted, provided that the sum of all menu boards and preview boards does not exceed 60 square feet in total display area and does not exceed 8 feet in height above street or driveway elevation.”; and

**WHEREAS**, the Town approved said amendment to Chapter 153, Zoning, §153.077(D)(7) of the Kill Devil Hills Town Code by unanimous vote at the above-referenced 2011 meeting of the Kill Devil Hills Board of Commissioners; and

**WHEREAS**, the Town’s approval of this 2011 amendment was effected pursuant to the requisite statutory codification procedure and duly adopted as part of the Town Code governing Kill Devil Hills; and

**WHEREAS**, through mistake or inadvertence, language within Chapter 153, Zoning, §153.077(D)(7) of the Kill Devil Hills Town Code created prior to the 2011 vote of the Board of Commissioners was inadvertently made part of a subsequent vote on amendment to other provisions of said Chapter, which vote occurred at a public hearing on May 23, 2012; and

**WHEREAS**, the minutes of the May 23, 2012, Kill Devil Hills Board of Commissioners meeting evidences that the then-serving Board only intended to consider amendments to other portions of Chapter 153, Zoning, §153.077, and that language concerning Chapter 153, Zoning, §153.077(D)(7) was inadvertently included in the 2012 text amendment proposal; and

**WHEREAS**, review of the public notices issued related to the above-referenced May 23, 2012, Kill Devil Hills Board of Commissioners public hearing evidences that no amendment to Chapter 153, Zoning, §153.077(D)(7) was to be considered by the Board at said meeting, thereby making any such amendment to Chapter 153, Zoning, §153.077(D)(7) procedurally defective and void as a matter of law; and

**WHEREAS**, by a majority vote of the currently serving Kill Devil Hills Board of Commissioners, with \_\_\_\_\_ voting for and \_\_\_\_\_ voting against, at its \_\_\_\_\_, 2022, open meeting, it is the Town's desire to adopt and make effective this Corrective Resolution in the Kill Devil Hills Town Code in order to accurately reflect the governing language of Chapter 153, Zoning, §153.077(D)(7) as approved by the then-serving Kill Devil Hills Board of Commissioners at the June 13, 2011 public hearing referenced herein; therefore be it

**RESOLVED**, That the Town enters this Corrective Resolution and states as follows:

1. The Town acknowledges the accuracy of the above recitals and agrees that this resolution is supported by adequate and legal consideration.
2. The Town certifies that Chapter 153, Zoning, §153.077(D)(7) of the Kill Devil Hills Town Code shall read as follows: "For each food service business, menu boards and preview boards for each drive-through may be permitted, provided that the sum of all menu boards and preview boards does not exceed 60 square feet in total display area and does not exceed 8 feet in height above street or driveway elevation."
3. The effective date of the aforesaid Town Code provision shall be as of the date of original adoption, being June 13, 2011.
4. That this Corrective Resolution requires no public hearing, as the Town Code of Kill Devil Hills is not being amended, but rather corrected due to the mistake and inadvertence named herein.
5. Except as stated herein, the remainder of the Town Code of Kill Devil Hills shall remain unaltered, to include any provisions within Chapter 153, Zoning, §153.077.

**IN WITNESS WHEREOF**, the Town of Kill Devil Hills has caused this Corrective Resolution to be executed by its Mayor, attested by its Town Clerk and its common corporate seal affixed hereto, all as the act and deed of said Town, done as of \_\_\_\_\_, 2022.

TOWN OF KILL DEVIL HILLS

SEAL

\_\_\_\_\_  
Benjamin A. Sproul  
Mayor

ATTEST:

\_\_\_\_\_  
James Michael O'Dell  
Deputy Town Clerk

STATE OF NORTH CAROLINA  
COUNTY OF DARE

I, \_\_\_\_\_, a Notary Public for the County of Dare and State of North Carolina, do certify that James Michael O'Dell personally appeared before me this day and acknowledged that he executed the foregoing instrument as Deputy Town Clerk, and that Benjamin A. Sproul signed on behalf of the Town of Kill Devil Hills as Mayor, all in accord with the minutes of the Board of Commissioners meeting duly entered on \_\_\_\_\_, 2022. Witness my hand and notarial seal or stamp, this the \_\_\_\_ day of \_\_\_\_\_, 2022.

\_\_\_\_\_  
Notary Public

(SEAL)

My commission expires:  
\_\_\_\_\_